IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP NO.972 Of 2002.

Judgment Reserved on 12.3.2007.

Date of decision: April 02,2007.

State of HP through Secy.(PW) and Another.

……. Petitioners.

Vs.

Smt. Anjana Devi and others. ……. Respondents.

Coram
The Hon'ble Mr.Justice Deepak Gupta, Judge.
The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting? Yes

For the petitioner: Mr.R.M. Bisht, Deputy Advocate General.

For the respondents: Mr. Suneet Goel, Advocate, for the legal representatives of deceased respondent No.1.

Mr.N.K. Thakur, Advocate, for respondent No.2.

Mr. Shrawan Dogra, Advocate, for respondent No.3.

Surinder Singh, J.

The present petition has been filed by the State to quash and set-aside the judgment dated 26.9.2001, passed in O.A. No.1555 of 1993 (Annexure P-1) by the State Administrative Tribunal.

-Admitted Facts-

It is an admitted case of the parties that:-

(1) both Srv.Shri Rakesh Chand Sood (deceased) and Sukh Dev Singh were in the Indian Navy.

(2) Shri Rakesh Chand Sood had joined the naval service on 14.10.1966 and was discharged on

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Whether reporters of local Papers may be allowed to see the judgment? Yes

31.10.1981. Sh. Sukh Dev Singh had joined the Indian Navy on 20.3.1969 and was released from there on 31.9.1981.

(3) both the ex-military personnels, as a result of their selection had joined against the general category in the Public works Department (Electrical wing), as Junior Engineers.

(4) Sh. Rakesh Chand Sood joined on 1.1.1983 and sh. Sukh Dev Singh on 15.1.1983.

(5) In **non-technical services** of the State, the ex-servicemen were governed for the seniority and pay under **"The Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal State non-Technical Services), Rules, 1972" (hereinafter to be referred as '1972 Rules').**

(6) The respondents had exercised their option pursuant to the letter dated 23.5.75 of the government, which provided that in case a released army personal is appointed against general un-reserved vacancy in the first instance in that event he is required to give his option to accept a reserved vacancy even if it occurs subsequent to his appointment, to grant them the benefit of their past military service with respect to fixation of seniority and pay but their representations were rejected.

(7) Vide letter dated 3-5-1983 (Annexure PA) the decision of the State Government was conveyed that henceforth 15% vacancy shall be reserved for ex-servicemen, in all posts/services technical as well as non-technical and will be filled in, by direct recruitment.

(8) In exercise of the powers conferred by the proviso to article 309 of the Constitution of India the Governor of Himachal Pradesh, in consultation with the H.P. Public Service Commission framed **The Ex-Servicemen (Reservation of Vacancies in Himachal Pradesh Technical services) Rules, 1985**, which were applicable with immediate effect , but were subsequently amended qua its application w.e.f.3.5.1983, (annexure P9),hereinafter called the **"1985 rules".**

(9) When the benefits were not granted to the representationists (respondents), by the state government, they had filed the **CWP no: 430 of 1986** in the High Court, which was transferred to the tribunal. The Tribunal vide its order dated 30.10.1991 directed it to be treated as representation to the government and directed them to decide it within two months and further directed that if the result would be against them, they could approach the Tribunal on the same cause of action.

(10) Since the representations were decided against the respondents herein, therefore they filed

the **O.A. No.1555 of 1993** before the learned Tribunal.

(11) Said sh. Rakesh Chand Sood (respondent in original application) died during the pendency of the matter before the Tribunal as such respondents No. (i) to (iii) were brought on record as his legal representatives.

(12) The petitioners herein resisted their claim before the Tribunal and the matter came up before the Division Bench of the Administrative Tribunal, consisting of Mr.Justice D.P. Sood, Chairman and Mr. Attar Singh, Member (Administrative). Both of them did not agree with each other, consequently, gave their dissenting judgments. **Mr. Justice D.P. Sood,** passed the following orders:

> **"As we have already observed in the preceding paras that applicants had exercised their option while filing the representation for being considered to the vacancies reserved for ex-servicemen pursuant to letter issued by the Government of Himachal Pradesh [General Administration dated May 23, 1975 (Annexure A-15)], both the applicants shall be deemed to have accepted the offer to be appointed against the vacancies reserved for ex-servicemen occurring immediately after 3.5.1983 for appointment/ adjustment with all consequential benefits. In other words both the applicants shall be considered against the first vacancies occurred immediately after 3.5.1983 falling immediately after the cut off date. Respondents are accordingly directed to appoint/post the applicants**

against the aforesaid vacancies reserved for ex-servicemen and to fix their pay and seniority in accordance with the provisions of '1972 Rule'(Annexure A-4).”

Mr. Attar Singh, Member (Administrative) passed the following order:

“The main point that emerges from the discussions above is that the reservations in technical posts for ex-servicemen have been made applicable w.e.f. 3.5.1983 whereas the applicants are the recruitee earlier to 3.5.1983 as such the benefit of pay and seniority in technical post cannot be granted to them as requested by the petitioners. Accordingly, I find no merit in the application and the same is rejected.”

Both the members of the Bench were equally divided on the following points:-

1. **Whether the respondents have created impermissible classification between ex-servicemen appointed against general vacancies in technical service by restricting the said benefit to those only who are appointed after 2.5.1983 and denying the same to those appointed before 2.5.1983?**

2. **Whether the claim of applicants to seek the benefit of army service can be defeated by respondents on the grounds of retrospectively?**

Thus, the Division Bench of the Tribunal referred the matter to the Chairman for passing appropriate orders for issuance of directions in accordance with Section 26 of the Administrative Tribunals Act, 1985,

for the final decision. The matter came up before **Mr. Justice A.L. Vaidya**, the then chairman, after hearing the parties and on going through the facts and law **concurred with Mr. Justice D.P. Sood** and endorsed the findings, consequently, allowed the original application, against which the petitioners sought the above relief in this petition.

Contention before us

We have heard the learned counsel for the parties and have also examined the documents placed on record.

The learned Deputy Advocate General has vehemently argued that the employees, who were the ex-servicemen appointed against general vacancies in technical service prior to 2.5.1983 could derive, no benefits in view of **"1985 rules"** which are statutory rules, meant for the technical services, as having been appointed against the general category prior to coming into force the **"1985 rules".** It is further argued that the learned Tribunal lost sight of the fact that the interpretation given by them will unsettle the settled position. It is urged that the provisions of the Constitution have been wrongly interpreted.

Contra, M/s Naresh Thakur & Suneet Goel, learned counsel for the respondents had taken us through the judgment of the learned tribunal and has pointed out that the facts of the present case are akin to the facts of the case of **Kishori Lal Gupta**, in which similar prayer was allowed in **OA No.2144/1995**, by the learned Tribunal vide **its order dated 30.5.1997** and

the benefits as sought by the respondents were granted to him, which was also implemented by the petitioners herein. It is further argued that the respondents were denied the benefit of approved military service simply on artificial and irrational cut off date 3.5.1983, which has created a separate class i.e. **that a person who has joined the service after 3.5.1983 would get the benefit of approved military service and persons appointed before the said date will not get the same benefits, which is irrational and impermissible classification and was rightly held to be violative of Articles 14 and 16 of the Constitution. Hence supported the impugned judgment.** Sh. Shrawan Dogra Advocate also rendered a valuable assistance to us in concluding the matter.

We have carefully examined the rival contentions on law and facts.

Now the issue before us is that whether the majority view as reflected in the judgment of the tribunal is legally sustainable?

As a matter of fact "1972 Rules" were in force only in non-technical services of the State to the ex-servicemen which provided reservation. The state government vide letter No: 11-76/71-GA A(Vol. II)dated 23rd may 1975 had issued a clarification under the "1972 rules". The contents of the letter can be usefully reproduced below:-

> **"Government of Himachal Pradesh General Administration Department, letter No.11-76/71-GA-A(Vol.II) dated the 23rd May, 1975.**
>
> **Subject:-Demobilised Army Personnel-concession when recruited against un-reserved vacancies.**

I am directed to address you on the subject noted above and to say that the various concessions granted under the Demobilised Armed Forces Personnel (Reservation of Vacancies in the Himachal State Non-Technical Services) Rules, 1972, notified vide this Department notification of even number, dated the 28th March, 1972 are admissible only when the persons concerned are selected against the reserved vacancies. In this connection, it is clarified that in order to remain within the scope of the relevant Rules, refers to above, the concessions in question cannot be extended against unreserved vacancies. But where a released Army Personnel has qualified against a non-reserved vacancy and has been appointed against a general un-reserved vacancy in the first instance he should be given an option (only at the time of first appointment) to accept a reserved vacancy even if it occurs subsequent to his appointment. This will automatically give the benefit of concessions like seniority etc. in the manner specified in the Rules ibid.

2. This also disposes of Home-B Department Letter No.7-13/72-Home (B) dated 19th February, 1975."

The respondents had made the representation and exercised their option, but it was rejected. As already said the respondents had joined the Civil Service in January, 1983. Subsequently, the State Government vide letter No:PER(AP-II)A(3)/82 dated 3rd may 1983, had also decided to reserve 15% vacancies in all posts/services technical as well as non-technical to be filled in by direct recruitment by the ex-servicemen. The contents of this letter are also reproduced hereunder:-

"Government of Himachal Pradesh Department of Personnel (A-II) letter No.PER (AP-II)A (3)/82 dated the 3rd May, 1983.

Subject: Reservation for Ex-Servicemen in Technical posts/services.

I am directed to say that at present reservation for Ex-Servicemen at the rate of 15% is available only in non-Technical posts/ Services. The question of providing reservation for Ex-Servicemen in technical post/ services as well has been under consideration of the Govt. for some time past. It has now been decided by the Government that henceforth 15% vacancies in all posts/ services technical as well as non-technical to be filed by direct recruitment shall be reserved for Ex-Servicemen.

2. These instructions will also apply to all Public Sector Undertakings/ Corporations/ Autonomous bodies.

3. These instructions may kindly be brought to the notice of all concerned."

Thus the benefit of reserving 15% posts for ex-servicemen which was available only for non-technical services was also extended to the technical posts as well. The resultant effect of this decision of the Government was that the respondents became entitled to all the benefits which were available to their counterparts in non-technical posts of the State under "1972 Rule". Further to bring this category within the ambit and scope of reservation the Government of Himachal Pradesh in consultation with the Himachal Pradesh Public Service Commission

notified "1985 Rule" on 19.9.86 which were brought into force with immediate effect but by a subsequent amendment as aforesaid these were brought in force w.e.f. 3.5.83 vide notification dated 14.3.1999, with a view to bring into the ambit and scope, the ex-servicemen who were appointed prior to the notification of "1985 Rules".

It is also interesting to note that a clarificatory letter no: PER (AP-II) A (3)-2/85 dated 11th December, 1987 (annexure PK) received from the under Secretary to the Government of Himachal Pradesh addressed to all the administrative departments also granted the concession the letter is reproduced hereunder:

"Sub:Demoblised army personnel-concession when

Recruited against unreserved vacancies.

I am directed to clarify that the instructions contained in the GAD letter no: 11-7/7-GA-A (vol.II) dated 23rd may, 1975 (copy enclosed for ready reference) are also applicable to the ex-servicemen appointed against unreserved posts in technical services with effect from the date the ex-servicemen (reservation of vacancies in H.P. State technical services)Rules, 1985 have come in force. Accordingly the benefit of option to accept the subsequent vacancy will be available only to the incumbents appointed after the enforcement of the aforesaid rules.

These instructions may be brought to the notice of all concerned for compliance."

Now, it is clear that by this, a category of ex-servicemen was left out, who were appointed before 2.5.83.i.e. before the enforcement of the "1985 Rules" thus this act of the Government created an impermissible classification between ex-servicemen appointed within the same technical service by restricting the benefit of those only who were appointed after 3.5.83 and denying the same to those appointed before 2.5.83. Thus a class within a class was created without any rationale, whereas, the ex-military personnel is one class itself and it is not possible to keep some persons out from the benefits without any reason. Therefore, the contention of the petitioner that "1985 rules" were made applicable only w.e.f. 3.5.83 as such no benefit can be granted of pay and seniority to the technical posts to the respondents is devoid of any merit.

The proviso of Article 309 of the Constitution lays down that 'any rules so made shall have effect, subject to the provisions of any such Act". Thus, if the appropriate legislation has passed an Act, under Article 309, the rules framed under the proviso will have effect subject to that Act; but in the absence of any Act of the appropriate Legislation, on the matter, the rules made by the President or the Government as the case may be, are to have a full effect both prospectively and retrospectively. Apart from the limitations pointed out above, there is no other limitation imposed by the proviso to Article 309 regarding the ambit of the operation of such rules.

[Pl. see **B.S. Vadera & Others Vs. Union of India, AIR 1969 SC 1187**].

It is well settled that Article 14 of the Constitution condemns discrimination not only by substantial law but also by a Law of procedure.

It is also equally settled that while Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however to pass the test of permissible classification two conditions must be fulfilled which are as under:

(a) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the groups; and

(b) that the differentia must have a rational relation to the object sought to be achieved by the statue in question.

Thus what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The Constitution Bench of the Hon'ble Supreme Court had expounded the law as aforesaid as far back as in the year 1958, in **Shri Krishan Dalmia's case [1958 SC 538]** which was followed in **Triloki Nath's case [1974, 1, SCC 19] and AIR 1979 S.C. 478.**

In D.S. Nakara and others Vs. Union of India [1983 Supreme Court 130) the Constitutional Bench of the Supreme Court, while relying on **AIR 1958 SC 538 supra** has reiterated that the classification may be

founded on differential basis according to the objects sought to be achieved but what is implicit in it is that there ought to be a nexus i.e. causal connection between the basis of classification and object of the statute under consideration. In other words, the class legislation is totally forbidden under article 14 of the Constitution as aforesaid.

Further the Supreme Court in **Raj Paul and others Vs. State of Haryana [AIR 1985 Supreme Court 1263)** has held:-

> **"All those persons released from the military service constitute one class and it is not possible to single out certain persons of the same class for differential treatment…."**

Therefore, we agree that the **"1972 Rules" and "1985 Rules"** were made to regulate the reservation of vacancies in the State of Himachal Pradesh in non-technical and technical services/posts respectively to give benefits of pay and seniority to all persons released from the army, which as already said constitute one class in itself. In **L.R.Kashyap Vs HPSEB and others in O.A 208 of 95**, the petitioner was also granted the similar benefit which was similar as claimed by the respondents herein, writ was dismissed on latches and in the SLP (civil)no:8698/2004:the relief given to Sh.L.R. Kashyap remained intact. Even Sh. Kishori Lal Gupta who was an ex-serviceman and was appointed as J.E.Electrical on 3.12.84 was also denied a similar benefit but vide judgment passed in **O.A.No:2144 of 95 decided on 30.597,** was held entitled to the benefit of approved military service with all

the consequences, to this effect the office order is 24.8.97 annexure K-1 on the record. Thus denying the benefit to the respondents is unjustified. Further, the applicability of "1985 Rules" providing the cut off date w.e.f. 3.5.83 is arbitrary. There was no reason- based decision, for keeping them out from the application of the benefits regarding their pay and seniority is thus is violation of the right to equality hence violative of Article 14 but it effected the public employment; therefore, it is also violative of Article 16 of the Constitution.

On the judicial scrutiny, we found no reasonable basis for keeping out the respondents, from the same class of ex-servicemen by not granting the benefits as aforesaid; their exclusion bears no nexus with the object in view. While applying the "1985 Rules", the petitioners did not understand that to leave out some of the similarly situated persons, from its benefit, would result into blatant injustice.

We have bestowed our best considerations to the rival contentions but judged from all the angles, it seems to be impossible to accept the submissions made by the learned Advocate General, as mini classifications on micro-distinctions are false, thus to overdo classifications in this case, to us appears to be, is to undo equality. Since we did not find anything to dislodge the reasoning given by learned Tribunal in their majority view, point aforesaid is answered accordingly. The petition filed by the

petitioners deserves to be dismissed and is accordingly dismissed.

No order as to costs.

In view of the dismissal of the writ petition, interim orders dated 10.7.2002 regarding stay and dated 12.8.2002 whereby the interim orders were made absolute accordingly stand vacated.

(Deepak Gupta)
Judge.

April 02, 2007.
(Pds)

(Surinder Singh)
Judge.